

BEFORE THE
SHORELINES HEARINGS BOARD
STATE OF WASHINGTON

IN THE MATTER OF A SHORELINE
SUBSTANTIAL DEVELOPMENT PERMIT
GRANTED BY KING COUNTY TO
GERALD HOWE

GERALD HOWE,

Appellant,

v.

KING COUNTY,

Respondent.

SHB No. 86-48

FINAL FINDINGS OF FACT,
CONCLUSIONS OF LAW AND
ORDER

This matter, the review of a substantial development permit for a bulkhead to serve property on the shorelines of Lake Sammamish in King County, came on for hearing on September 2, 1987, in the City of Redmond, Washington. Sitting as the Board were Lawrence Faulk (Presiding), Wick Dufford, (Chairman), Members Judith A. Bendor, Les Eldridge, Dennis McLerran and Bob Rose.

Appellant Gerald Howe was represented by Attorney Michael Rodgers. Respondent King County was represented by Patrick J. Schneider, Deputy Prosecuting Attorney. Court reporter Michael Brennan with Evergreen Court Reporting Co. recorded the proceeding.

1 Witnesses were sworn and testified. Exhibits were admitted and
2 examined. Argument was heard. From the testimony and exhibits the
3 Board makes these

4 FINDINGS OF FACT

5 I

6 Appellant Gerald Howe owns property located at 2721 East Lake
7 Sammamish Parkway N.E., on the eastern shore of Lake Sammamish in King
8 County, in a shoreline of statewide significance under the Shoreline
9 Management Act, Chpt. 90.58 RCW. Mr. Howe's partially finished home
10 sits back approximately 30 feet from a concrete bulkhead built in the
11 spring and summer of 1982 without a shoreline permit. This appeal
12 concerns that bulkhead and related fill.

13 II

14 King County is a political subdivision with the responsibility for
15 administering the Shoreline Management Act within its area of
16 jurisdiction--an area which includes the site of the instant
17 controversy. The County has adopted a Shoreline Master Program
18 (KCSMP), incorporated into the Washington Administrative Code at WAC
19 173-19-250, and codified in the King County Code in Title 25. We take
20 notice of the KCSMP's provisions.

21 III

22 On April 15, 1986, appellant Howe applied for a Shoreline
23 Substantial Development Permit to legitimize the previously built
24

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1 concrete bulkhead, placement of fill behind the bulkhead
2 (approximately 150 cubic yards), and a 1981-built single family
3 dock. All were constructed without requisite shoreline permits.
4 Under the KCSMP, the site in question is located within the
5 "Conservancy" shoreline environment.

6 Following a hearing on September 24, 1986, the King County
7 Shoreline Hearing Officer issued a shoreline permit, No. 027-86-SH,
8 authorizing the retention of the dock, subject to a building permit
9 final inspection. However, regarding the bulkhead and fill, the
10 permit required that:

11 The western 14 feet, 10 inches of the existing
12 bulkhead and fill shall be removed by the
13 applicant, and the ground surface shall be
14 restored to pre-existing conditions within 12
months from the date of final administrative or
judicial action . . .

15 Feeling aggrieved by this portion of the decision, Mr. Howe filed
16 an appeal with this Board on October 30, 1986. The appeal was
17 certified by the Department of Ecology on November 7, 1986.

18 IV

19 On Lake Sammamish, as in other water bodies, the ordinary high
20 water mark (OHWM) is a moving line, changing over time as natural
21 forces operate on the lakeshore.

22 At the Howe property over the past decade the general direction of
23 movement has been inland, resulting in some erosion. The OHWM today
24 is 15 to 20 feet landward of the lakefront wall of Howe's bulkhead.

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V

All parties concur that the critical issue in this case is the location of the OHWM at the time the bulkhead and fill were put in place in 1982. This means we are trying to determine where the OHWM was over five years ago.

VI

Appellant Howe's construction of the bulkhead and placement of the fill have largely destroyed evidence of where the vegetation line was on his property in 1982. The adjacent properties, both north and south, are not bulkheaded.

VII

The OHWM is defined at RCW 90.58.030(2)(b):

(b) "Ordinary high water mark" on all lakes, streams, and tidal water is that mark that will be found by examining the bed and banks and ascertaining where the presence and action of waters are so common and usual, and so long continued in all ordinary years, as to mark upon the soil a character distinct from that of the abutting upland, in respect to vegetation as that condition exists on June 1, 1971, as it may naturally change thereafter, or as it may change thereafter in accordance with permits issued by a local government or the department: Provided, that in any area where the ordinary high water mark cannot be found . . . the ordinary high water mark adjoining fresh water shall be the line of mean high water;

The relevant line for the OHWM here, then is the vegetation line.

VIII

Appellant's position that the bulkhead was not waterward of the OHWM vegetation line when built is unconvincing for several reasons.

1 His expert testified that a few roots of plants -- ones not tolerant of
2 year-round submersion in water -- were found a few inches waterward of
3 the bulkhead. Roots, however, are not main stems and do not establish
4 a vegetation line. The expert also qualified his conclusions, stating
5 that the bulkhead could be on the OHWM.

6 Moreover, appellant's testimony in all aspects, lacked credibility,
7 particularly given the details of his long involvement with the County
8 and the Army Corps of Engineers relative to this site.

9 Appellant's presentation failed to convince us that, more probably
10 than not, the vegetation line was waterward of the bulkhead when the
11 structure was built.

12 IX

13 We find that no public safety or fisheries resources necessity has
14 been demonstrated for the fill. We further find that the dock,
15 bulkhead and fill in 1982 cost more than the fair market value of
16 \$1,000.

17 X

18 Appellant's contention that the County has proceeded unfairly
19 against him is unsupported by the evidence.

20 XI

21 Any Conclusion of Law which is deemed a Finding of Fact is hereby
22 adopted as such.

23 From these Findings of Fact we come to the following
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CONCLUSIONS OF LAW

I

We review shoreline substantial development permits for consistency with the applicable master program and the policies of the Chapter 90.48 RCW, the Shoreline Mangement Act (SMA).

II

Appellant, the person requesting review of the permit as issued, has the burden of proof. RCW 90.58.140(7). Appellant has failed to sustain that burden.

III

A threshold question is whether the bulkhead and fill involved in this case are exempt from the substantial development permit requirement of the SMA. RCW 90.58.030(3)(e)(ii) exempts from the definition of substantial development the "construction of the normal protective bulkhead common to single family residences."

The KCSMP at Section 25.16.180C establishes criteria that must be met for a bulkhead to qualify for the exemption. Subsection 3 thereof requires that the bulkhead be located landward of the OHWM or connected to adjacent legally established bulkheads.

Under the facts here, the bulkhead does not qualify for the permit exemption. It was not shown to be either landward of the OHWM in 1982 or connected to adjacent legally established bulkheads.

IV

The KCSMP does not expressly speak to the matter of location of

1 bulkheads in Conservancy environments. However, reading the relevant
2 use regulations together, and harmonizing them with the purpose of the
3 Conservancy environment, leads us to conclude that bulkheads are not
4 permitted uses in such environments waterward of the OHWM, except in
5 those extraordinary situations in which fill is permitted below the
6 OHWM.

7 The purpose of the Conservancy environment designation is to
8 maintain the existing character of the area. KCSMP 25.24.010.
9 Consistent with this purpose, bulkheads are allowed at all only in
10 narrowly defined circumstances, which include, however, the protection
11 of legally constructed residences. KCSMP Section 25.24.130.
12 Residential bulkheads are normally analyzed as a unit with any
13 associated fill, See WAC 173-14-040(c); MacDonald v. Island County, SHB
4 No. 80-29 (1980). Fills in Conservancy environments are not permitted
15 below the OHWM except "to mitigate conditions which endanger public
16 safety or fisheries resources." KCSMP Section 25.24.140A.

17 Under the facts here, the fill was not shown to be required for the
18 mitigation of dangers to public safety or fisheries resources, and,
19 therefore, it was not shown to be a permitted use below the OHWM. We
20 further note that even in the more intensively developed Urban
21 environment, filling is not generally permitted if "used to create new
22 lands." KCSMP 25.16.180F. Any fill below the OHWM would have such an
23 effect.

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Therefore, in light of the regulatory scheme as a whole, we decide that the location of both the bulkhead and fill, as constructed in the instant case, is in violation of the KCSMP.

V

In reaching our conclusion here, we render no opinion on whether or not the bulkhead and fill in question might qualify for a variance or conditional use permit.

VI

Any Finding of Fact which is deemed a Conclusion of Law is hereby adopted as such.

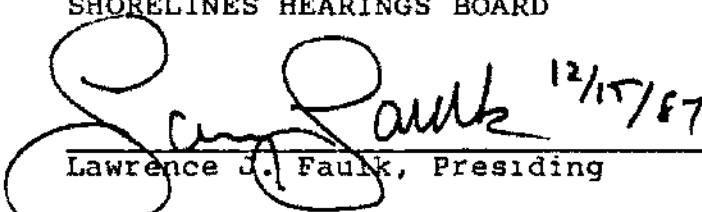
From these Conclusions of Law the Board enters this


ORDER

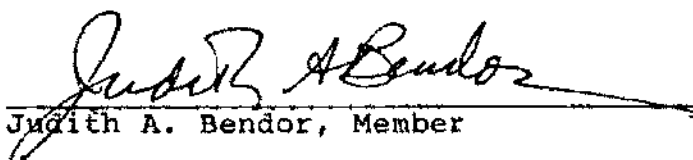
King County Permit Number 027-86-SH is AFFIRMED.

DONE this _____ day of December, 1987.

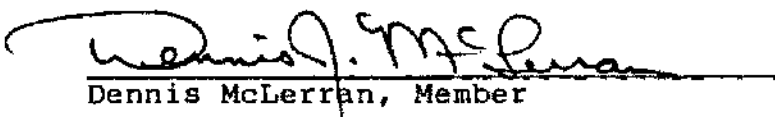
SHORELINES HEARINGS BOARD

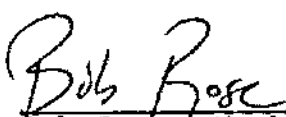
 12/15/87
Lawrence J. Faulk, Presiding


Wick Dufford, Chairman


Judith A. Bendor, Member

 by WB
Les Eldridge, Member


Dennis McLerran, Member


Bob Rose, Member

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